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Supreme Court of the United States

October Term, 1957

No. 977

ALFRED K. STERN and MARTHA DODD STERN,

Petitioners,

against

UNITED STATES OF AMERICA.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

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The Government does not deny the importance, nor does it dispute the substantiality of the basic question presented by the petitioners to the Court of Appeals, namely, that the subpoenas, for failure to obey which they were held in contempt, were void, unauthorized by law, and did not constitute lawful mandates of the Court.

The Court of Appeals was persuaded to refrain from passing on the merits of the petitioners' appeal, duly and timely perfected, by prejudicial hearsay assertions and characterizations which petitioners' counsel had no opportunity to answer in the few days permitted by the last minute notice to dismiss.

The Government, referring to the rules governing criminal appeals, raises a question as to the "timeliness" of the petition.

In *Nye* v. *United States*, 313 U. S. 33, this Court held that an appeal from a judgment of criminal contempt is

stance which rendered it proper to require the non-resident witness to give up his business, or other activity abroad, and return to this country at the risk of great penalties. Congress realized that such procedure would serve to protect both the public interest and the rights of the non-resident witness.

An application to a court must be based upon sufficient, valid and legal grounds. If the Attorney General's mere desire to have the witness testify were deemed sufficient in itself, there would be no necessity for making provision for any application to the Court.

It is even doubtful whether the Attorney General can delegate the power to make such application to an Assistant United States Attorney without a specific showing that he expressly authorized or approved it. In *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, the Court was considering whether an Administrator, who by statute was given the authority to sign and issue subpoenas, could delegate that power to Regional Directors. This Court held that he could not, saying:

> "Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer. Under the present Act, the subpoena may, as in this case, be used to compel production at a distant place of practically all of the books and records of a manufacturing business, covering considerable periods of time. True there can be no penalty incurred for contempt before there is a judicial order of enforcement. But the subpoena is in form and official command, and even though improvidently issued it has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command or their natural respect for what appears to be an official command, or because of their reluctance to test the subpoena's validity by litiga-

tion. All these are cogent reasons for inferring an intention of Congress not to give unrestricted authority to delegate the subpoena power which it has in terms granted only to the responsible head of the agency."

In the present proceeding, the Court was not furnished by the Attorney General with any statement whatever, not even a statement that he authorized, approved or even had knowledge of the application. Nor was there any statement specifying or identifying the criminal proceeding in which the testimony of the petitioners was desired, or that either of them had ever testified before any Court or Grand Jury with respect to matters that the Attorney General desired to have them testify or that they had any knowledge or information which would render their testimony material or of assistance in any criminal proceeding conducted by the Government; or that there existed any necessity or emergency which would justify the compulsion of their return to this country, on the pain of penalties.

In the Court below the Government contended that it was not necessary to present any facts to the Court other than a statement, without more, that the Attorney General "desired" their testimony; in other words that the Court was to be treated merely as a rubber stamp to be applied on the Attorney General's mere request.

Congress does not have power to impose on the Courts a ministerial function to be performed on command of the Attorney General. It is fundamental law that a Federal Court can exercise judicial functions only, and a Statute which is interpreted to give the Court non-judicial functions is unconstitutional.

United States v. *Ferreira*, 13 How 40 and
Keller v. *Potomac Electric Company*, 261 U. S. 428.

The Interstate Commerce Act was among the first Statutes establishing a procedure whereby an Administrative

Agency was required to apply to the Court for enforcement of a subpoena, and the Court upheld the validity of the procedure in *I. C. C.* v. *Brimson*, 154 U. S. 447, because the function of the Court was to determine judicially whether grounds to warrant enforcement of the subpoena were distinctly set forth.

In dealing with the need for showing a proper basis upon which a Court is required to act, it was said in *McDonald* v. *United States*, 335 U. S. 451, 455-6:

> "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. *It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law.* The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home." (Italics added.)

In the absence of any showing a) that a criminal proceeding was pending; b) that the desired testimony was material and important in such proceeding; and c) that there were adequate reasons for requiring the non-resident witness to return, the Court had no basis for the exercise of any judicial discretion and was without power or jurisdiction to make the orders in question.

5.

The judgments of contempt were unauthorized and the fines were illegal.

A. Disobedience of a void subpoena or a void order, issued by a court without jurisdiction, is not contempt.

When " * * * " a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void and the judgment for the contempt is equally void."

Ex Parte Fisk, 113 U. S. 713;
Ex Parte Terry, 128 U. S. 289;
In re Ayers, 123 U. S. 443.

Since the contempt here charged was not committed in the presence of the Court, Section 401, 18 U. S. C., expressly limits the power of the Court to punish for contempt to instances where there is "*disobedience or resistance to its lawful writ, process, order, rule, decree or command.*"

Essential to a valid conviction, is a showing a) that the subpoenas and the orders authorizing them were valid, and b) that the contempt proceeding itself was in accordance with established practice.

Here, the order to show cause of March 14, 1957 and its supporting affidavit which initiated, and formed the basis of the contempt proceeding, were never served upon the petitioners and they have not been furnished with any statement of "essential facts constituting the criminal contempt charged."

Without the service of such notice, the Court could not properly try or find the petitioners guilty.

B. The subpoenas issued to petitioners under the seal of the Court and the signature of the Clerk, pursuant to Judge McGohey's orders, contained the clear and explicit notice, with respect to a possible disregard or disobedience of its command: "*this you * * * are not to omit, under the penalty upon you * * * of Two Hundred and Fifty Dollars.*"

Thus, the maximum penalty specified for disobedience of the subpoena was clearly stated to be $250.00. Any penalty in excess of that amount is a denial of due process, illegal, cruel and excessive punishment and a deprivation of the petitioners' constitutional rights.

In the Court below, the Government attempted to evade the consequences of this official notice by claiming that a "card" purporting to give notice of the issuance of the subpoena and delivered with the subpoena contained the words "*Two Hundred and Fifty Dollars* and other penalty provided by law." But this card was not an official document, was not issued pursuant to any order, was not given under the seal of the Court, was not signed by the Clerk of the Court nor even by the Attorney General, and in any event gave no notice or warning of any money penalty in excess of $250.00. The primary purpose of this card was to advise the witness to appear for a preliminary interview at the office of the Assistant United States Attorney instead of the Grand Jury.

CONCLUSION

For the foregoing reasons it is respectfully prayed that the petition for a writ of certiorari be granted.

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APPENDIX

Decision Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 103—October Term, 1957.

Argued November 6, 1957. Decided December 5, 1957.

Docket No. 24685

—o—

In the Matter of

The issuance of a Subpoena to ALFRED K. STERN and MARTHA DODD STERN, citizens of the United States presently residing in Mexico,

Appellants,

against

UNITED STATES OF AMERICA,

Appellee.

—o—

Before:

SWAN, MEDINA and WATERMAN, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Richard H. Levet, Judge.

On petition of appellee to dismiss the appeal.

The appellants, Mr. and Mrs. Stern, appeal from orders finding them guilty of contempt in failing to obey grand jury subpoenas, and fining each $25,000. Service of the subpoenas and of the orders to show cause why they should not be punished for contempt was made in Mexico pursuant to 28 U. S. C. A. Section 1783, 1784. The appellants challenge the legality of such service. But before reaching the

merits of the appeal the appellee's motion to dismiss must be considered.

PAUL W. WILLIAMS, U. S. Attorney, ROBERT KIRTLAND, and HERBERT C. KANTOR, Assistant U. S. Attorneys, of Counsel, for appellee-movant.

PAUL O'DWYER, Attorney for appellants, in opposition.

PER CURIAM:

The motion is based upon the affidavit of an Assistant United States Attorney, made on information and belief. The affidavit sets out the following facts: On February 22, 1957, subpoenas were issued, pursuant to orders of a Judge of the District Court for the Southern District of New York, commanding the Sterns to appear before a federal grand jury on March 14, 1957, in the United States Court House in New York City. The subpoenas were personally served upon them in Mexico City on February 27, 1957, by an American Consul. Appearing specially by their attorney, the Sterns moved on March 7, 1957, to quash the subpoenas. After argument their motions were denied on March 12. On the following day the Sterns petitioned this court for a writ of prohibition or mandamus directing the District Judge to vacate the subpoenas and to issue a stay pending disposition of the petition. This court denied the stay on March 14, 1957, and on April 16, 1957, denied "Per Curiam" the petition.

The grand jury convened on March 14, 1957, but the Sterns did not appear. On the same day Judge Murphy ordered them to show cause on March 26, 1957, why they should not be punished for contempt for failure to obey the subpoenas, and further ordered the Marshal to seize property of the Sterns, not to exceed $100,000 each, within the United States to be held to satisfy any judgment

arising out of these proceedings. The order also directed that a copy thereof be served upon the Sterns at least seven days before March 26, 1957. They filed notice of appeal from this order on March 22, 1957.

As the American Consul in Mexico City had been unable to serve a copy of the show cause order of March 14, 1957, Judge Murphy amended the return date to April 15, 1957, and the time for service to seven days prior thereto. This amended order was personally served on the Sterns by an American Consul on April 1, 1957. Upon their application the contempt hearing was adjourned from April 15, to April 25, 1957. On that date the hearing was held before Judge Levet and decision reserved. On May 1, 1957, he denied the motion to set aside the show cause order of March 14, 1957, and refused to expunge that portion of the order which directed the Marshal to seize property. On May 6, 1957, Judge Levet held the Sterns in contempt of the District Court and fined them $25,000 each. Notices of appeal from this judgment were filed May 10, 1957.

The moving affidavit alleges that during the period from February 28, 1957, to April 24, 1957, the Sterns liquidated assets in the United States worth more than $500,000, and that their purpose in liquidating their assets was to frustrate the court's power to collect the fines. The government has been unable to find any property of the Sterns in the United States, and the fines remain unpaid, although the District Court did not authorize any stay in the execution of its order. Nor did the appellants post any bond pursuant to Rule 38(a)(3) F. R. Cr. P. to guarantee payment of the fines.

On July 20, 1957, the appellants fled from the Republic of Mexico to Czechoslovakia. They made this trip on Paraguayan passports and purported to be naturalized citizens of Paraguay. It is alleged that their purpose was to remove themselves further from the reach of the judicial power of the United States.

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 977

ALFRED K. STERN AND MARTHA DODD STERN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On February 21, 1957, pursuant to orders of the United States District Court for the Southern District of New York (R. 4, 7), in response to the application of counsel for the Government (R. 5–7), subpoenas (R. 7–8) were issued under the authority of 28 U. S. C. 1783,[1] commanding petitioners, a hus-

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[1] This section provides in pertinent part:

"§ 1783. *Subpoena of witness in foreign country.*

"(a) A court of the United States may subpoena, for appearance before it, a citizen or resident of the United States who:

* * * * *

"(2) is beyond the jurisdiction of the United States and whose testimony in a criminal proceeding is desired by the Attorney General.

"(b) The subpoena shall designate the time and place for appearance before such court of the United States, and shall

band and wife who were at that time citizens of the United States residing in Mexico, to appear before the federal grand jury for that District on March 14, 1957, and to give evidence in connection with an alleged violation of 18 U. S. C. 371 (the general conspiracy statute). The orders authorizing the issuance of the subpoenas directed that they be served by any American consul in Mexico and that each petitioner was to be tendered, at the time of such service, travel and attendance expenses in the amount of $468 (R. 4; see R. 6). On February 27, 1957, the subpoenas were personally served on petitioners by the American Consul in Mexico City, who tendered each the sum of $468, which each accepted (R. 17).

On March 7, 1957, petitioners, appearing specially by counsel, moved to quash the subpoenas and to set aside the orders for their issuance (R. 9, 34). Following oral argument on March 11th, the motions were, on March 12, 1957, denied (R. 10, 18).[2]

On March 14, 1957, neither petitioner appeared before the grand jury as required by the terms of their respective subpoenas (R. 18). On the same date, both were ordered to show cause, on March 26, 1957, why they should not be punished for contempt for their

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issue to any United States consul in such foreign country. The consul shall make personal service of the subpoena and any order to show cause, rule, judgment or decree on the request of the court of the United States or its marshal, and shall make return thereof to such court after tendering to the witness his necessary travel and attendance expenses, which shall be determined by such court and sent with the subpoena."

[2] Petitioners thereafter sought, without success, to challenge the orders of denial in the Court of Appeals through writs of mandamus and prohibition (R. 18, 34).

failure to obey the subpoenas (R. 10–11). The order of the court, service of which was required to be made on petitioners at least seven days prior to the return date (R. 12), further directed that the United States Marshal seize property in the United States belonging to petitioners, in amounts not to exceed $100,000 each, to be held to satisfy any judgment arising out of the proceedings (R. 34–35).[3]

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[3] See 28 U. S. C. 1784, which provides in pertinent part as follows:

"§ 1784. *Contempt.*

"(a) A court of the United States which has issued a subpoena served personaliy in a foreign country may order the witness who has failed to appear as directed therein to show cause before it at a designated time why he should not be punished for contempt.

"(b) If security is given for any damage which the witness might suffer should the charge be dismissed, the court may direct, as a part of such order, that any property of the witness within the United States be levied upon or seized, in the manner provided by law or court rules governing levy or seizure under execution, and held to satisfy any judgment that may be rendered against the witness. The security required by this subsection shall not be required of the United States.

* * * * *

"(d) On the return day of such order or any later day to which the hearing may be continued, proof shall be taken. If the charge of recusancy against the witness is sustained, the court may adjudge him guilty of contempt and, notwithstanding any limitation upon the power of the court generally to punish for contempt, may fine him not more than $100,000 and direct that the fine and costs of the proceeding be satisfied unless paid by a sale of the property levied upon or seized, such sale to be conducted upon the notice required and in the manner provided for sales upon execution. Any such judgment rendered upon service by publication only may be opened for answer within one year."

On March 21, 1957, upon the advice of the American Consul in Mexico City that he had been unable to make service of the foregoing order of March 14th within the time required by its terms (R. 12–13, 28–30), the order was amended so as to make the return date April 15, 1957, and the service date not less than seven days prior to that date (R. 10–11, 27–28, 35). On April 1, 1957, petitioners were personally served with this amended order (R. 19, 26, 35).

On April 15, 1957, counsel for petitioners appeared specially for petitioners and moved that the proceedings be adjourned to April 25, 1957; the motion was granted (R. 19, 35). On the latter date, counsel for petitioners, again entering a special appearance on petitioners' behalf, moved to dismiss or annul the contempt proceedings and to set aside the order of March 14th, *supra*, directing the United States Marshal to seize property in the United States belonging to petitioners (R. 14–15, 19–20). On May 1, 1957, the District Court (Levet, D. J.) entered an order (R. 15) and opinion (R. 16–21) denying this motion.

On May 6, 1957, pursuant to 28 U. S. C. 1784 (see fn. 3, *supra*, p. 3), petitioners were adjudged in contempt of court, and each was sentenced to pay a fine of $25,000, "to be satisfied, unless paid, pursuant to" the provisions of that section (R. 22–23).

On appeal by petitioners from this judgment to the Court of Appeals for the Second Circuit, the Government, in addition to briefing and arguing the merits of the case, moved to dismiss the appeals (R. 31) for the reasons stated in an accompanying affidavit of

counsel (R. 32–37). In this affidavit, Government counsel (Assistant United States Attorney Kantor), after summarizing the proceedings as hereinabove set forth (R. 33–35), alleged that, "[a]fter the issuance of the order of March 14, 1957, authorizing the seizure of property [see *supra*, p. 3], the Government found that, although the [petitioners] had owned more than a million dollars worth of securities in American corporations during the year 1956, these securities and other assets had been liquidated before seizure could be effected by the Government"; that, "[d]uring the period from February 28, 1957, to April 24, 1957 alone, the [petitioners] liquidated assets worth over half a million dollars"; that "[t]he purpose of the [petitioners] in liquidating these assets was to frustrate the exercise of the judicial power of the United States"; that "[t]he Government has to date been unable to find any property of the [petitioners] in the United States, and the fines remain unpaid, although the District Court did not authorize any stay in the execution of its order"; that petitioners had not "post[ed] any bond pursuant to Federal Rule of Criminal Procedure 38 (a) (3)[1] to guarantee payment of the fines"; and that on July 20, 1957, peti-

[1] Rule 38 (a) (3) provides:

"A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the district court or by the court of appeals upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating his assets."

tioners, traveling on Paraguayan passports and purporting to be naturalized citizens of Paraguay, had, for "[t]he purpose of * * * remov[ing] themselves further from the reach of the judicial power of the United States," "fled from the Republic of Mexico * * * to Russian dominated Czechoslovakia" (R. 35–36).[5] "The conduct of the [petitioners] in liquidating their American assets, abandoning their citizenship, and fleeing behind the Iron Curtain," it was contended, "has shown that they have no intention of complying with the mandate of this Court should it affirm the judgment below" (R. 37). Accordingly, it was urged, the Court of Appeals "should not lend its power to the decision of an appeal so blatantly abandoned by the [petitioners]" (*ibid.*).

An affidavit in opposition to the foregoing motion to dismiss (R. 38–40) was filed by counsel for petitioners, appearing specially on their behalf, but, as noted by the Court of Appeals, this affidavit denied none of the facts alleged in the affidavit of Government counsel, said "not a word about [petitioners'] liquidating their assets," and did not "[suggest] that they have any assets remaining in the United States", (R. 44; Pet. App. 32).

On December 5, 1957, the Court of Appeals, in a *per curiam* opinion (R. 41–44, Pet. App. 29–32, reported at 249 F. 2d 720), directed the clerk to "enter an order dismissing the appeal unless within 60 days

[5] The affidavit further stated that petitioners, on September 9, 1957, had been indicted in the Southern District of New York for conspiracy to commit espionage against the United States (R. 36).

from the date of this opinion the [petitioners] shall deposit the amount of their fines and costs in the registry of the district court or give bond for the payment thereof" (R. 44; Pet. App. 32). "Upon the record before us," said the court in explaining its decision, "the conduct of the [petitioners] in liquidating their American assets, abandoning their United States citizenship and going to Czechoslovakia, shows a determined effort to deprive the court of power to execute its mandate if the judgment on appeal should be affirmed. Here we have an undisputed, studied, and successful attempt to render the court powerless to enforce its decree. We see no valid distinction between this case and that of Eisler v. United States, 338 U. S. 189, dismissed 883" (*ibid.*).

On February 5, 1958, petitioners having failed to comply with the conditions set forth in the Court of Appeals' opinion, *supra* (R. 47), their appeals were dismissed (R. 48). The petition for a writ of certiorari seeks review of this judgment.

1. There lies at the threshold a question as to the petition's timeliness.

The judgment of the Court of Appeals, dismissing the appeals, was entered on February 5, 1958 (R. 48). If this was a judgment "in a criminal case" (as we think it plainly was—see *infra*), petitioners had under the Rules of this Court (Rule 22 (2)) thirty days from that date, plus an additional thirty days if authorized by a Justice of the Court, or until April 7, 1958, within which to file a petition for certiorari. The petition was not filed until May 5, 1958.

treated as a civil appeal, and that the procedures for civil appeals apply to the time limitations.

In that case, this Court construed the Act of March 8, 1934 (former 28 U. S. C. 723a) which, in so far as relevant, was substantially identical with present 18 U. S. C. 3772 saying:

> "We come then to the question of the jurisdiction of the Circuit Court of Appeals. We disagree with the Government in its contention that the appeal in this case was governed by the Criminal Appeals Rules. Those rules were promulgated pursuant to the provisions of the Act of March 8, 1934 (48 Stat. 399; 28 U. S. C. 723a) which provided, *inter alia*, that this Court should have 'the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the Court if a jury has been waived, or plea of guilty, in criminal cases'. The rules were adopted 'as the Rules of Practice and Procedure in all proceedings after plea of guilty, verdict of guilty by a jury is waived, in criminal cases'. 292 U. S. 661. In this case there was no plea of guilty, there was no verdict of guilt by a jury, and there was no finding of guilt by the Court where a jury was waived. To be sure, the rules and the Act are applicable 'in criminal cases'. But we do not agree with the government that the qualifying language of the rules designates merely the stage of the proceedings 'in criminal cases' where the rules become applicable. It is our view that the rules describe the kinds of cases to which they are to be applied. The Act of March 8, 1934 amended the Act of February 24, 1933 (47 Stat. 904) which gave this Court rule-making power 'with respect to any or all proceedings after verdict in criminal cases'. The legislative history makes it abundantly clear that the amendment in 1934 so far as material here, was made because 'it would not seem to be desirable that there should be different times and manner of procedure in cases of appeal where there is a verdict of a jury as distinguished from cases in which there is a finding of guilt by the Court on the waiver of a jury.'"

The Government opposes the petition in reliance upon a strained interpretation of Rule 54(b)(5) which excludes the application of Rule 38(a)(3) to * * * "proceedings against a witness in a foreign country under Title 28 U. S. C. 1784".

Incidentally and in any event Rule 38(a)(3) entitled "Stay of Execution and Relief Pending Review" confers no power to dismiss an appeal, but only to impose conditions in such instances where an application is made for a stay of execution pending review.

It is respectfully submitted the petition for a Writ of Certiorari should be granted.

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